IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 71-1812

JAKE LAYNE, BILL WELLS, EDDIE TAYLOR, F. D. SALISBURY, and CLYNARD JONES, Suing as Residents, Patrons, Taxpayers, Legal Voters and Citizens of the Martin School District of the Commonwealth of Kentucky, and on Behalf of All Other Persons Similarly Situated - - - - - - - - - Petitioners

versus

BOARD OF EDUCATION OF FLOYD COUNTY, KENTUCKY, CHARLES CLARK, County Superintendent of Schools of Floyd County, Kentucky, JOHN M. STUMBO, Chairman of the Board of Education of Floyd County, Kentucky, DR. J. H. ALLEN, Member of the Board of Education of Floyd County, Kentucky, BILL BLAIR, Member of the Board of Education of Floyd County, Kentucky, ROSS COOLEY, Member of the Board of Education of Floyd County, Kentucky, O. R. HOWARD, Member of the Board of Education of Floyd County, Kentucky, BOARD OF EDUCATION OF FLOYD COUNTY, KENTUCKY, As a Body Politic - - - - - - - - Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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INDEX

PAGE

Opinions Below 2– 3

Jurisdiction 3

Questions Presented 4

Constitutional Provisions Involved 5

Section X 5

Fourteenth Amendment 5

Statement of the Case 5– 9

Reasons for Granting the Writ 10–15

Conclusion 15

Appendix 17–48

A. Opinion of the Judge of the Floyd Circuit Court entered the 18th day of September, 1970 17–20

B. Opinion of the Court of Appeals of Kentucky reported in 474 S. W. 2d 397 and handed down on October 22, 1971 21–25

C. Copy of mandate issued by the Court of Appeals of Kentucky on January 21, 1972, overruling petition for rehearing 26

D. Copy of judgment entered by the Floyd Circuit Court on January 21, 1939, in the case of Orris Gearheart, et al. v. Board of Education of Floyd County, et al. 27–30

E. Copy of complaint filed by petitioners in the Floyd Circuit Court 31–46

F. Portion of appellee's brief filed with the Court of Appeals of Kentucky which discusses the federal question involved in this action 47–48

CASE CITATIONS

	PAGE
Arnold & M. Co. v. *Industrial Commission*, 314 Ill. 251, 145 N. E. 342, 40 A. L. R. 1470	11
Collins v. *Welsh*, 75 F. 2d 894, 99 A. L. R. 1319	11
Collins v. *Welsh*, 295 U. S. 762, 79 L. Ed. 1704, 55 S. Ct. 921	11
Floyd County Board of Education v. *Layne*, 474 S. W. 2d 397	9
Layne v. *Floyd County Board of Education*, 442 S. W. 2d 587	9
McCullough v. *Commonwealth of Virginia*, 172 U. S. 102, 43 L. Ed. 382, 19 S. Ct. 134	11
Pennsylvania Co. v. *Scott*, 144 A. L. R. 852	11
Springstun v. *Springstun*, 131 Wash. 109, 229 Pac. 14, 40 A. L. R. 595	11

IN THE

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JAKE LAYNE, BILL WELLS, EDDIE TAYLOR, F. D. SALISBURY, and CLYNARD JONES, Suing as Residents, Patrons, Taxpayers, Legal Voters, and Citizens of the Martin School District of the Commonwealth of Kentucky, and on Behalf of All Other Persons Similarly Situated - - - - - - *Petitioners*

v.

BOARD OF EDUCATION OF FLOYD COUNTY, KENTUCKY, CHARLES CLARK, County Superintendent of Schools of Floyd County, Kentucky, JOHN M. STUMBO, Chairman of the Board of Education of Floyd County, Kentucky; DR. J. H. ALLEN, Member of the Board of Education of Floyd County, Kentucky, BILL BLAIR, Member of the Board of Education of Floyd County, Kentucky, Ross COOLEY, Member of the Board of Education of Floyd County, Kentucky, O. R. HOWARD, Member of the Board of Education of Floyd County, Kentucky, BOARD OF EDUCATION OF FLOYD COUNTY, KENTUCKY, As a Body Politic - - - - - *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, Jake Layne, Bill Wells, Eddie Taylor, F. D. Salisbury, and Clynard Jones, suing as residents, patrons, taxpayers, legal voters, and citizens of the Martin School District of the Commonwealth of Kentucky, and on behalf of all other persons similarly situated, pray that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals of the State of Kentucky rendered in these proceedings on October 22, 1971.

OPINIONS BELOW

The opinion of the Judge of the Floyd Circuit Court is unreported and appears at Appendix A, pp. 17-20. The opinion of the Court of Appeals of Kentucky is reported in 474 S. W. 2d 397. A copy of that opinion appears in Appendix B, pp. 21-25.

The caption of this case, while pending in the Court of Appeals of Kentucky, was as follows:

> FLOYD COUNTY BOARD OF EDUCATION; CHARLES CLARK, Superintendent of Schools of Floyd County, Kentucky; JOHN M. STUMBO, Chairman of the Floyd County Board of Education of Floyd County, Kentucky; DR. J. H. ALLEN, Member of the Floyd County Board of Education of Floyd County, Kentucky; BILL BLAIR, Member of the Floyd County Board of Education of Floyd County, Kentucky; ROSS COOLEY, Member of the Floyd County Board of Ed-

ucation of Floyd County, Kentucky; O. R. Howard, Member of the Floyd County Board of Education of Floyd County, Kentucky

Appellants

v.

Jake Layne, Bill Wells, Eddie Taylor, F. D. Salisbury, and Clynard Jones, Suing as Residents, Patrons, Taxpayers, Legal Voters and Citizens of the Martin School District of Martin County Kentucky, and On Behalf of All Other Persons Similiarly Situated

Appellees

The number of this case was F-237-70

JURISDICTION

The order or judgment of the Court of Appeals of Kentucky was entered on October 22, 1971. (See Appendix B, pp. 21-25.)

The Petitioners filed a petition for rehearing with the Court of Appeals within the time required by the rules of that Court. The petition for rehearing was denied on January 21, 1972.

No formal entry of an order was entered denying the petition for rehearing, but, on January 21, 1972, the Court of Appeals of Kentucky, according to its custom, issued a mandate showing the overruling of the petition for rehearing. A copy of said mandate appears in Appendix C, p. 26.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

The Board of Education of Floyd County, Kentucky, a body politic which derives its powers solely from the statutory provisions of the Commonwealth of Kentucky, has undertaken to ignore the provisions of a judgment entered on January 21, 1939, by the Floyd Circuit Court, which judgment was never appealed, directing it to maintain a twelve-grade school in the City of Martin, Kentucky, and enjoining it from abandoning, discontinuing, or suspending the teaching of any of the twelve grades in said school, so long as there is a sufficient number of pupil children residing within the said district to meet the legal requirements for maintaining a twelve-grade school. It is the plan of the respondent, Board of Education of Floyd County, Kentucky, to ignore this judgment and to transport children residing in the City of Martin to another high school over a dangerous highway.

The questions thereby arising are whether or not a board of education may destroy, annul, set aside, vacate, reverse, modify, or impair the final judgment of a court of competent jurisdiction so as to take away private rights which have become vested by the judgment.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Section X:

> ". . . nor pass any law impairing the obligation of contracts . . ."

Constitution of the United States, Amendment XIV, §1:

> ". . . nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

STATEMENT OF THE CASE

On January 21, 1939, in an action between Orris Gearheart, W. S. Frazier, J. D. Adams, Dennis Martin, E. K. Frazier, Demra Taylor, Perry Osborne, W. G. Jarrell, and D. E. Chafin, residents of the Town of Martin, plaintiffs, and Board of Education of Floyd County, Kentucky, Harold Bailey, Bill Allen, Charles Burnette, Alex Stephens, Dr. W. D. Osborne, Town Hall, Superintendent of Schools, Amanda Dingus, W. J. Dingus, Jr., W. D. Dingus, Elizabeth Dingus, Jamima Qualls, Olva Dingus, and Tally Dingus, defendants, it was adjudged by the Floyd Circuit Court of the Commonwealth of Kentucky as follows:

> "That the Martin Consolidated School District was created and organized about the year 1923 and by agreement between the citizens and taxpayers of said district of the one part and the Floyd County Board of Education of the other part, a twelve grade school was established in the

Town of Martin said Martin Consolidated School District, which twelve grade school, ever since has been and is now being maintained. The citizens and taxpayers of said district, as a part of said arrangement with Floyd County Board of Education, purchased the school site in the Town of Martin, for the sum of $1500.00; which was conveyed to said Floyd County Board of Education, without charge, said parcel of land being valued by the parties at the sum of $5,000.00 and in addition thereto made substantial contributions toward construction of the first building on said site. A special consolidated school tax was voted by the legal white voters of said district about the year 1923 of 75¢ on the $100.00 valuation of all taxable property in said district to supplement the revenues available from the common school levy for the running expenses of said school, which tax was reduced to 50¢ on $100.00 valuation about the year 1928. Thereupon, by further agreement between said Board of Education and the citizens of said Consolidated School District, a second building was erected on said school site in the Town of Martin and to pay part of the cost thereof there was submitted to and voted by the legal voters of said district a bond issue of $12,000.00, the proceeds from the sale of said bonds being used in the construction of said new brick building for use in enlarging the twelve grade school already existing on said site; that the original building, which was a frame structure, is now being used for a gymnasium as well as an emergency class room and that the County Board of Education has been required, during the last school year to rent rooms in the Town of Martin for one or more of the subjects taught in said school.

"There is now being maintained a twelve grade school in said Martin Consolidated School District, established as above stated, and the Court is of the opinion that it would be an abuse of discretion on the part of the defendants, Board of Education of Floyd County, and Town Hall, Superintendent of Schools, to discontinue, abandon or suspend the teaching of any of the twelve grades at said school now located in said district, so long as there is a sufficient number of pupil children in said district to meet the legal requirements or to require the pupil children of said district in any of the twelve grades to attend school outside of said district.

"It is ordered, therefore, that the defendants, Board of Education of Floyd County, Kentucky, and the individual members thereof, and Town Hall, Superintendent of Schools of Floyd County, and their successors, and each of them, are hereby directed to maintain the twelve grade school now located in the Town of Martin and with said Martin Consolidated School District, and to take any and all appropriate action necessary and incidental thereto, including the hiring of teachers, paying teachers' salaries, prescribing full and complete courses in the twelve grades and defraying all expenses necessary and incidental thereto; that said defendants and their successors in office and each of them, be and they are hereby perpetually enjoined from abandoning, discontinuing, or suspending the teaching of any of the twelve grades in said school now located in the Town of Martin, and within the Martin Consolidated School District, so long as there is a sufficient number of pupil children residing within said district to meet the legal requirements for maintaining a twelve grade school, and from requiring the pupil chil-

dren in said district, or any of them, in all or any of said twelve grades, to attend any school located outside of said District, all to the end that said twelve grade school now located in said Martin Consolidated School District shall continue to be maintained and operated as a twelve grade school without being disturbed.

"The Court further finds that the defendants are not acting within their reasonable discretion in planning to build a school for high school pupils outside of said Martin Consolidated School District and on the site referred to in the evidence and in purchasing the said proposed school site for the price of $4,000.00. It is adjudged, therefore, that the defendants, Floyd County Board of Education and the individual members thereof, and Town Hall, Superintendent of Schools, and each of them, and their successors in office, be and they are hereby perpetually enjoined and restrained from purchasing or leasing, or accepting a deed of conveyance or lease or other instrument for the purpose of constructing a high school or other school building upon the site described in the petition or any other site, from the defendants Amanda Dingus, W. J. Dingus, Jr., W. D. Dingus, Elizabeth Dingus, Jamima Qualls, Olva Dingus and Tally Dingus, or either of them, or their successors or assigns, near the Forks of Beaver Creek, and from expending any money therefor, and from accepting any bid, or awarding any contract for the construction of a high school, or other building, upon said site." (See Appendix D, pp. 27-30.)

In 1969, thirty years after the entry of this judgment, the Board of Education of Floyd County, Ken-

tucky, decided to build a consolidated school at Eastern, some five miles from Martin and outside the boundaries of the Martin Consolidated School District, and, under this plan, would transport school children from within the Martin Consolidated School District of this new high school in open violation of the provisions of the judgment above mentioned. Suit was first filed to enjoin the Construction of the Eastern school. On the first appeal of this case, the Court of Appeals of Kentucky held that the Board could construct the new school but expressly reserved the question relative to the transportation by bus of the high school students from Martin.

> Lane v. Floyd County Board of Education, 442 S. W. 2d 587.

The case was then submitted to the same judge who found that the provisions of the judgment entered on January 21, 1939, were valid, and he upheld the judgment. The Court of Appeals reversed the judgment.

> Floyd County Board of Education v. Layne, 474 S. W. 2d 397.

The federal question now before this Court was raised in the Floyd Circuit Court where the action was first commenced and in the Court of Appeals of Kentucky by appropriate pleadings and briefs. A copy of the complaint first filed in the Floyd Circuit Court is filed and made a part of the appendix. See Appendix E, pp. 31-46). The portion of appellee's brief filed with the Court of Appeals of Kentucky which discusses the federal question involved in this action appears at Appendix F, pp. 47-48.

REASONS FOR GRANTING THE WRIT

A Board of Education May Not Destroy, Annul, Set Aside, Vacate, Reverse, Modify, or Impair the Final Judgment of a Court of Competent Jurisdiction so as to Take Away Private Rights Which Have Become Vested by the Judgment.

The citizens of the Martin Consolidated School District contributed a large amount of money to the building of the school facility at Martin and voted to levy taxes for this purpose. Furthermore, by agreement between the Board of Education and the citizens of the Martin Consolidated School District, a second building was erected in the Martin Consolidated School District and to pay part of the cost of this building, the legal voters of the Martin Consolidated School District voted a bond issue of $12,000.00, the proceeds from which were used in the construction of the new brick building for use in enlarging the said twelve-grade school already existing on the site.

The citizens of the Martin Consolidated School District, therefore, acquired property rights by reason of the entry of the said judgment dated January 21, 1939, and neither the Floyd Circuit Court nor the Court of Appeals of Kentucky had jurisdiction to vacate or modify any of the provisions of said judgment as such action would deprive the citizens of the Martin Consolidated School District of their property rights without due process of law and would be in irreconcilable conflict with Section X and the Fourteenth Amendment to the Constitution of the United States.

In the case of Pennsylvania Co. v. Scott, 144 A. L. R. 852, the rule on this question is thus stated:

> *"There are two reasons for this limitation of legislative power; one, that a judgment is property of which, under state and federal constitutional prohibitions, the judgment creditor cannot be deprived without due process of law; the other, that under our system of the division of governmental powers the legislature cannot invade the province of the judiciary by interfering with judgments or decrees previously rendered."* (Our Emphasis.)

To the same effect, see the following cases:

Arnold & M. Co. v. Industrial Commission, 314 Ill. 251, 145 N. E. 342, 40 A. L. R. 1470;

Springstun v. Springstun, 131 Wash. 109, 229 Pac. 14, 40 A L. R. 595.

This Court is committed to the same rule:

Collins v. Welsh, 75 F. 2d 894, 99 A. L. R. 1319;

Collins v. Welsh, 295 U. S. 762, 79 L. Ed. 1704, 55 S. Ct. 921;

McCullough v. Commonwealth of Virginia, 172 U. S. 102, 43 L. Ed. 382, 19 S. Ct. 134.

The case of McCullough v. Commonwealth of Virginia, *supra,* is squarely in point. In that case, in a very able opinion delivered by Mr. Justice Brewer, the position of the petitioners is squarely upheld, the Court saying:

> *"While it is undoubtedly the general rule of this court to accept the construction placed by the*

courts of a state upon its statutes and Constitution, yet one exception to this rule has always been recognized, and that in reference to the matter of contracts alleged to have been impaired. This was distinctly affirmed in Jefferson Branch Bank v. Skelly, 1 Black, 436, 443 (17:173, 771), in which the court, speaking by Mr. Justice Wayne, gave these reasons for the exception: 'It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the supreme court of a state, whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the states from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular state legislation, if this court could not decide, independently of all adjudication by the supreme court of a state, whether or not the phraseology of the instrument in controversy was expressive of a contract and with the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the supreme court of a state? It never was intended, and cannot be sustained by any course of reasoning, that this court should, or could with fidelity to the Constitution of the United States, follow the construction of the supreme court of a state in such a matter, when it entertained a different opinion.' The doctrine thus announced has been uniformly followed" (43 L. Ed. 382-38). (Our Emphasis.)

As the Legislature of the Commonwealth of Kentucky cannot destroy, annul, set aside, or vacate a judgment of a court of competent jurisdiction so as to take away private rights which have become vested in it by a judgment, certainly a board of education does not have such power as such board of education only has the powers granted to it by the statutes of the Commonwealth of Kentucky. The powers granted by Kentucky Revised Statutes to boards of education are as follows:

> *"Each school district shall be under the management and control of a board of education consisting of five members, to be known as the 'Board of Education of ....., Kentucky.' Each board of education shall be a body politic and corporate with perpetual succession. It may sue and be sued; make contracts; purchase, receive, hold and sell property; issue its bonds to build and construct improvements; and do all things necessary to accomplish the purposes for which it is created"* (Kentucky Revised Statutes, 160.160). (Our Emphasis.)

Consequently, it is quite plain that a board of education is merely an instrumentality of the Commonwealth of Kentucky and does not have the power to vacate, set aside, or ignore a judgment of a court of competent jurisdiction under which private rights have become vested.

It may be contended, however, that no private rights have vested under this judgment. This position can-

not be sustained. The private rights so acquired are as follows:

(1) The citizens of Martin purchased the school site for the sum of $1,500.00 and conveyed it to the Board of Education of Floyd County, Kentucky, without charge, the property being valued at the sum of $5,000.00.

(2) In addition to this gift, the same citizens made substantial contributions towards construction of the first building on this site.

(3) A special consolidated school tax was voted by the voters of said district about the year 1923 of 75 cents on the $100.00 valuation of all taxable property in the district to supplement the funds available from the common school levy for the running expenses of the school. This tax was reduced to 50 cents about the year 1928.

Later a second building was erected on this school site in the Town of Martin and to pay part of the costs thereof the legal voters of said district voted a bond issue of $12,000.00, the proceeds from the sale of such bond being used in the construction of the new brick building for use in enlarging the twelve-grade school.

(4) The original building, which was a frame structure, was used, prior to its destruction by fire in about 1969 or 1970, as a gymnasium and as an emergency classroom.

It is, therefore, quite apparent that the effect of the Court of Appeals of Kentucky is to take away from the petitioners private rights which have become vested by the judgment entered on January 21, 1939.

Such action, we submit, is in open violation of Section X and the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION

For the foregoing reasons, it is earnestly submitted that a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of Kentucky.

Respectfully,

JOE HOBSON
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Prestonsburg, Kentucky 41653
Counsel for Petitioners

APPENDIX A

FLOYD CIRCUIT COURT

CR 6953

Orders Civil Causes
September Term, 11th Day
18th Day of September, 1970

JAKE LAYNE, ET AL., - - - - - *Plaintiffs,*

against

BOARD OF EDUCATION OF FLOYD COUNTY, KENTUCKY, ET AL., - - - - - - *Defendants*

OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

The issues remaining to be tried in this case are:

1. The plaintiff's contention that the judgment in the case of Orris Gearheart, et al. against the Board of Education of Floyd County, Kentucky, rendered in 1939, is still a valid and enforceable judgment, and

2. Defendants' plea of res judicata relying on a judgment entered in the Floyd Circuit Court on May 29, 1968, being the case of Raymond Griffith against the Floyd County Board of Education.

After hearing the evidence presented by the plaintiffs and defendants and argument of counsel, the Court is of the opinion that the two remaining issues in the case are primarily questions of law, the first issue being in the nature of a request for a declaration of rights.

In considering the pleadings and exhibits relating to the case of Raymond Griffith against Floyd County Board of Education, it is apparent that the plaintiff in that suit made no pretense of suing as a representative of a class, in this instance the residents and voters of the Martin School District. For this reason primarily, the Court is of the opinion that the defendants' plea of res judicata is not well taken and the judgment in the Griffith case, entered on the 29th day of May, 1968, therefore, is not a bar to the cause of action set out by plaintiffs in this case, who meet the requirements of maintaining a class action.

The pertinent language of the judgment rendered in the Gearheart case entered in 1939, is as follows:

> "It is ordered, therefore, that the defendants, Board of Education of Floyd County, Kentucky, and the individual members thereof, and Town Hall, Superintendent of Schools of Floyd County and their successors, and each of them, are hereby directed to maintain the twelve-grade school now located in the Town of Martin and within said Martin Consolidated School District, and to take any and all appropriate action necessary and incidental thereto, including the hiring of teachers, paying teachers' salaries, prescribing full and complete courses in the twelve grades and defraying all expenses necessary and incidental thereto; that said defendants and their successors in office and each of them, be and they are hereby perpetually enjoined from abandoning, discontinuing or suspending the teaching of any of the twelve grades in said school now located in the Town of Martin, and within the Martin Consolidated School District, so long as there is a sufficient number of pupil children residing within said district to meet the legal requirements for maintaining a twelve grade school, and from requiring the pupil children in said district, or any of them, in all or any of

said twelve grades, to attend any school located outside of said District, all to the end that said twelve grade school now located in said Martin Consolidated School District shall continue to be maintained and operated as a twelve grade school without being disturbed."

It is the opinion of the Court that the language of this judgment with the conditions imposed therein is not arbitrary and capricious and are in all respects reasonable.

Some evidence was taken and exhibits filed relating to the conditions laid down in the 1939 judgment. The Court is of the opinion that any determination at this time relating to these requirements and conditions, is premature. If at some time in the future, which is highly probable, the Floyd County Board of Education orders the closing of the Martin School, then and in that event it will be necessary to take proof to determine the number of school children residing within the district in order to satisfy the conditions set out in the 1939 judgment relied upon by the plaintiffs.

s/ James B. Stephenson
Special Judge

JUDGMENT

The remaining issues in this case having been submitted for final judgment and the Court having considered the record and arguments of counsel, it is Ordered and Adjudged that the judgment in the case of Orris Gearheart, et al. against the Board of Education of Floyd County is a valid judgment and the terms thereof are in full force and effect.

The provisions in the judgment applicable here are:

"It is ordered, therefore, that the defendants, Board of Education of Floyd County, Kentucky, and the individual members thereof, and Town Hall, Superintendent of Schools of Floyd County and their succes-

sors, and each of them, are hereby directed to maintain the twelve grade school now located in the Town of Martin and within said Martin Consolidated School District, and to take any and all appropriate action necessary and incidental thereto, including the hiring of teachers, paying teachers' salaries, prescribing full and complete courses in the twelve grades and defraying all expenses necessary and incidental thereto; that said defendants and their successors in office and each of them, be and they are hereby perpetually enjoined from abandoning, discontinuing, or suspending the teaching of any of the twelve grades in said School District, so long as there is a sufficient number of pupil children residing within said district to meet the legal requirements for maintaing a twelve grade school, and from requiring the pupil children in said district, or any of them, in all or any of said twelve grades, to attend any school located outside of said District, all to the end that said twelve grade school now located in said Martin Consolidated School District shall continue to be maintained and operated as a twelve grade school without being disturbed."

It is further ordered and adjudged that the judgment entered in the Floyd Circuit Court on May 29, 1968, in the case of Raymond Griffith vs. Floyd County Board of Education is not a bar to the plaintiffs' cause of action herein.

This is a final judgment and this case is stricken from the docket subject to be redocketed should the Floyd County Board of Education at some future date order the closing of the Martin School, at which time evidentiary hearing may be had to determine compliance with the terms and conditions of the judgment in the Gearheart case.

Each party shall pay its own costs.

s/ James B. Stephenson
Special Judge

APPENDIX B

COURT OF APPEALS OF KENTUCKY

RENDERED: October 22, 1971

FLOYD COUNTY BOARD OF EDUCATION, ET AL. - - - - - - - - - *Appellants*

v.

JAKE LAYNE, ET AL. - - - - - - *Appellees*

Appeal from Floyd Circuit Court
Honorable James B. Stephenson, Special Judge

OPINION OF THE COURT BY COMMISSIONER CULLEN—REVERSING

This appeal is by the Floyd County Board of Education from a judgment of the Floyd Circuit Court declaring that the board could not close the twelve-grade school at Martin, Kentucky, except upon the existence of circumstances specified in a judgment of January 21, 1939, in a former action, as being the only circumstances which would authorize a closing.

The instant action was brought by a small group of individuals, alleging themselves to be "citizens, residents, taxpayers, patrons, and legal voters of the Martin School District," seeking to enjoin the construction of a consolidated school at Eastern, and to enjoin the closing of the

Martin school as a part of the consolidation plan.[1] The court entered an order permitting them to maintain the action as representatives of a class, "i.e. the citizens and residents of *Martin,* Kentucky" (our emphasis).

The plaintiffs pleaded that the board of education was precluded under the doctrine of res judicata from closing the Martin school, by virtue of the 1939 judgment above mentioned, which was entered in an action brought against the board of education in 1938 by a few persons who identified themselves as "citizens, residents, taxpayers and legal white voters of Floyd County, Kentucky, and more particularly of, and within, the Martin Consolidated School District, and who pleaded that they brought the suit "for and on behalf of all the taxpayers of Floyd County, Kentucky, and particularly the taxpayers and patrons of Martin Consolidated School District."

The 1939 judgment declared that the board of education and its successors in office were "perpetually enjoined from abandoning, discontinuing, or suspending the teaching of any of the twelve grades in said school now located in the Town of Martin, and within the Martin Consolidated School District, so long as there is a sufficient number of pupil children residing within said district to meet the legal requirements for maintaining a twelve grade school, and from requiring any pupil children in said district, or any of them, in all or any of said twelve grades, to attend any school located outside of said district, all to the end that said twelve grade school now located in said Martin Consolidated School District shall continue to be maintained and operated as a twelve grade school without being disturbed."

The circuit court in the instant action was of the opinion that the 1939 judgment was controlling of the instant action under the doctrine of res judicata. We do not agree.

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[1]See Layne v. Floyd County Board of Education, Ky., 442 S. W. 2d 587, for the disposition of the question of contruction of the new school at Eastern.

We believe it is important to give full consideration to the purpose of the doctrine of res judicata and its basis in public policy:

> "The doctrine of res judicata is a judicially created doctrine, which may be said to exist as an obvious rule of reason, justice, fairness, expediency, practical necessity, and public tranquillity. Public policy, judicial orderliness, economy of judical time, and the interest of litigants, as well as the peace and order of society, all require that stability should be accorded judgments, that controversies once decided on their merits shall remain in repose, that inconsistent judicial decisions shall not be made on the same state of facts, and that there be an end to litigation which, without the doctrine of res judicata, would be endless." 46 Am. Jur. 2d, Judgments, sec. 395, pp. 559 to 561.

> "The doctrine of res judicata may be said to inhere in legal systems as a rule of justice. Hence, the position has been taken that the doctrine of res judicata is to be applied in particular situations as fairness and justice require, and that it is not to be applied so rigidly as to defeat the ends of justice or so as to work an injustice.

> "The sound policy behind the doctrine is also to be considered in applying the doctrine. In this respect, application of the doctrine has been denied where the policies underlying the doctrine were not applicable to the peculiar facts involved, and where the circumstances presented a unique and nonrecurrent situation. Moreover, there are exceptions to the doctrine of res judicata based upon other important reasons of policy. In this respect it has been declared that res judicata, as the embodiment of a public policy, must at times be

weighed against competing interests, and must on occasion, yield to other policies. * * *" 46 Am. Jur. 2d, Judgments, sec. 403, pp. 569, 570.

The doctrine of res judicata is applicable to *class actions*, but is applied to them with great caution, and where the reason for the rule does not exist the rule itself will not be enforced. 46 Am. Jur. 2d, Judgments, secs. 539, 540, pp. 695, 696.

There appears to us at least two reasons why it would be anomalous to apply res judicata in the instant case. First, we are dealing with a class action involving a limited class on one side and a public body on the other. The Floyd County Board of Education serves and represents the entire Floyd County school district, and owes duties to all of the citizens. The 1939 judgment was obtained by a group of citizens who made no real representation or pretence of representing any class other than "the taxpayers and patrons of the Martin Consolidated School District." The plaintiffs in the instant action were authorized to represent a class consisting of "the citizens and residents of Martin, Kentucky." Thus, were res judicata to be applied here, we would have the anomaly of a public body, representing an entire county, being bound and precluded by a judgment obtained by a class which did not purport to consist of all of the citizens of the county; the effect of so binding the board being to bind citizens who never were purported to be represented in the class action.

Secondly, it is firmly established that a school board cannot by *contract* divest itself or its successors of the discretionary powers granted to it by the legislature. See Ewing v. Peak, Ky., 266 S. W. 2d 300; Board of Education of Louisville v. Society of Alumni of Louisville Male High School, Ky., 239 S. W. 2d 931. If a school board cannot contract away its discretionary powers, would it not be anomalous for this court to held that the board can lose its

discretionary powers through litigation brought by persons purporting to represent only a small part of the citizens of the school district?

We have in this case the following factors that weigh against application of res judicata: "The "Martin Consolidated School District" no longer exists as a subordinate unit of the Floyd County School District. A generation has passed since the 1939 judgment was entered. The policy of the law with respect to consolidation of schools has changed during that period. See Clemons v. Bottoms, Ky., 262 S. W. 2d 85. The public policy is that school boards have wide discretion in the management of school systems, including the number and location of school buildings, and interference with administrative discretion of that kind is not a proper judicial function. See 16 Am. Jur. 2d, Constitutional Law, sec. 224, pp. 467 to 471. There have been extensive changes in facilities of communication and transportation since 1939. The law as embodied in administrative regulations promulgated by the State Board of Education, in regard to consolidation of schools, has changed.

In addition to the foregoing factors we have here some of the elements involved in Ward v. Southern Bell Telephone & Telegraph Co., Ky., 436 S. W. 2d 794, which led this court to find the doctrine of estoppel by judgment inapplicable in that case.

It is our conclusion that neither reason, justice, fairness, expediency, practical necessity nor public tranquillity calls for application of the doctrine of res judicata in this case.

The judgment is reversed with directions for further proceedings in conformity with this opinion.

All concur.

Attorney for Appellants:
W. W. BURCHETT, Prestonsburg, Kentucky 51653

Attorneys for Appellees:
JOE HOBSON, Prestonsburg, Kentucky 41653
PAUL E. HAYES, Prestonsburg, Kentucky 41653

APPENDIX C

COURT OF APPEALS OF KENTUCKY

Fall Term—October 25, 1971

FLOYD COUNTY BOARD OF EDUCATION, CHARLES CLARK, Supt. etc, et al.

v.

JAKE LAYNE, et al.

Appeal from a judgment of the Floyd Circuit Court

MANDATE

The Court being sufficiently advised, it seems the judgment herein is erroneous.

It is therefore considered that said judgment is reversed with directions for further proceedings in conformity with this opinion; which is ordered to be certified to said court.

It is further considered that the appellants recover of the appellees their cost herein expended.

A copy—Attest:
Frances Jones Mills, C.C.A.
By /s/ John C. Scott, D.C.

Issued January 21, 1972

APPENDIX D

FLOYD CIRCUIT COURT

ORRIS GEARHEART, et al., - - - - - - - *Plaintiffs*

v.

BOARD OF EDUCATION OF FLOYD COUNTY, KENTUCKY, - - - - - - - *Defendants*

JUDGMENT—Entered January 21, 1939

This cause, having been submitted to the court for trial and judgment upon the whole case, and the court, upon consideration of the pleadings, proof and exhibits, and being fully advised, finds, orders and adjudges, as follows:

(1) That the Martin Consolidated School District was created and organized about the year 1923 and by agreement between the citizens and taxpayers of said district of the one part and the Floyd County Board of Education of the other part, a twelve grade school was established in the Town of Martin and within said Martin Consolidated School District, which twelve grade school, ever since has been and is now being maintained. The citizens and taxpayers of said district, as a part of said arrangement with Floyd County Board of Education, purchased the school site in the Town of Martin, for the sum of $1500.00, which was conveyed to said Floyd County Board of Education, without charge, said parcel of land being valued by the parties at the sum of $5,000.00 and in addition thereto made substantial contributions toward construction of the first building on said site. A special consolidated school tax was

voted by the legal white voters of said district about the year 1923 of 75¢ on the $100.00 valuation of all taxable property in said district to supplement the revenues available from the common school levy for the running expenses of said school, which tax was reduced to 50¢ on $100.00 valuation about the year 1928. Thereupon, by further agreement between said Board of Education and the citizens of said Consolidated School District, a second building was erected on said school site in the Town of Martin and to pay part of the cost thereof there was submitted to and voted by the legal voters of said district a bond issue of $12,000, the proceeds from the sale of said bonds being used in the construction of said new brick building for use in enlarging the twelve grade school already existing on said site; that the original building, which was a frame structure, is now being used for a gymnasium as well as an emergency class room and that the County Board of Education has been required, during the last school year, to rent rooms in the Town of Martin for one or more of the subjects taught in said school.

There is now being maintained a twelve grade school in said Martin Consolidated School District, established as above stated, and the Court is of the opinion that it would be an abuse of discretion on the part of the defendants, Board of Education of Floyd County, and Town Hall, Superintendent of Schools, to discontinue, abandon or suspend the teaching of any of the twelve grades at said school now located in said district, so long as there is a sufficient number of pupil children in said district to meet the legal requirements or to require the pupil children of said district in any of the twelve grades to attend school outside of said district.

It is ordered, therefore, that the defendants, Board of Education of Floyd County, Kentucky, and the individual members thereof, and Town Hall, Superintendent of Schools of Floyd County and their successors, and each of

them, are hereby directed to maintain the twelve grade school now located in the Town of Martin and within said Martin Consolidated School District, and to take any and all appropriate action necessary and incidental thereto, including the hiring of teachers, paying teachers' salaries, prescribing full and complete courses in the twelve grades and defraying all expenses necessary and incidental thereto; that said defendants and their successors in office and each of them, be and they are hereby perpetually enjoined from abandoning, discontinuing, or suspending the teaching of any of the twelve grades in said school now located in the Town of Martin, and within the Martin Consolidated School District, so long as there is a sufficient number of pupil children residing within said district to meet the legal requirements of maintaining a twelve grade school, and from from requiring the pupil children in said district, or any of them, in all or any of said twelve grades, to attend any school located outside of said District, all to the end that said twelve grade school now located in said Martin Consolidated School District shall continue to be maintained and operated as a twelve grade school without being disturbed.

(2) The court further finds that the defendants are not acting within their reasonable discretion in planning to build a school for high school pupils outside of said Martin Consolidated School District and on the site referred to in the evidence and in purchasing the said proposed school site for the price of $4,000.00. It is adjudged, therefore, that the defendants, Floyd County Board of Education and the individual members thereof, and Town Hall, Superintendent of Schools, and each of them, and their successors in office, be and they are hereby perpetually enjoined and restrained from purchasing or leasing, or accepting a deed of conveyance or lease or other instrument for the purpose of constructing a high school or other school building upon the site described in the petition or any other site, from the

defendants Amanda Dingus, W. J. Dingus, Jr., W. D. Dingus, Elizabeth Dingus, Jamima Qualls, Olva Dingus and Tally Dingus, or either of them, or their successors or assigns, near the Forks of Beaver Creek, and from expending any money therefor, and from accepting any bid, or awarding any contract for the construction of a high school, or other building, upon said site.

(3) It is further adjudged that the plaintiffs, Orris Gearheart, W. S. Frazier, J. D. Adams, Dennis Martin, E. K. Frazier, Demra Taylor, Perry Osborne, W. G. Jarrell and D. E. Chafin, recover of the defendants, Board of Education of Floyd County, Kentucky, Harold Bailey, Bill Allen, Charles Burnette, Alex Stephens, Dr. W. D. Osborne, Town Hall, Superintendent of Schools, Amanda Dingus, W. J. Dingus, Jr., W. D. Dingus, Elizabeth Dingus, Jamima Qualls, Olva Dingus and Tally Dingus, their costs herein expended, for the collection of which they may have execution, and this cause is hence dismissed and stricken from the docket.

The defendants and each of them object and except to the foregoing judgment and pray an appeal to the Court of Appeals, which is granted.

APPENDIX E

FLOYD CIRCUIT COURT

CR No. 6953

JAKE LAYNE, BILL WELLS, EDDIE TAYLOR, F. D. SALISBURY, and CLYNARD JONES, suing as residents, patrons, taxpayers, legal voters, and citizens of the Martin School District of the Commonwealth of Kentucky, and on behalf of all other persons similarly situated, - - *Plaintiffs*

v.

BOARD OF EDUCATION OF FLOYD COUNTY, KENTUCKY, CHARLES CLARK, County Superintendent of Schools of Floyd County, Kentucky, JOHN M. STUMBO, Chairman of the Board of Education of Floyd County, Kentucky, DR. J. H. ALLEN, Member of the Board of Education of Floyd County, Kentucky, BILL BLAIR, Member of the Board of Education of Floyd County, Kentucky, ROSS COOLEY, Member of the Board of Education of Floyd County, Kentucky, O. R. HOWARD, Member of the Board of Education of Floyd County, Kentucky, BOARD OF EDUCATION OF FLOYD COUNTY, KENTUCKY, as a body politic, HENRY STUMBO, BILL WELLS, ZEB OUSLEY, EDWARD CAUDILL, and DEWEY ROBERTS, Members of and composing the Floyd Fiscal Court - *Defendants.*

COMPLAINT—Filed January 10, 1969

The plaintiffs, for complaint against the defendants, state as follows:

1. That they and each of them are citizens, residents, taxpayers, patrons, and legal voters of the Martin School District, Floyd County, Kentucky.

That said District was first created and organized about the year 1923, as the Martin Consolidated School District and since said time, it has been maintained as a part of the public school system of Floyd County, Kentucky, pursuant to and in compliance with the statutes of the Commonwealth of Kentucky in such cases made and provided.

That said Martin School District does not now exist as a consolidated school district, but does exist as a part of the school system of Floyd County, Kentucky, and is being maintained as part of such system.

2. The City of Martin was, at the time of the creation of said Martin Consolidated School District, a municipal corporation of the 6th class, created and organized and existing under the laws of the State of Kentucky, and is now a city of the 4th class.

3. The public spirited citizens, taxpayers, patrons and legal voters of said Martin School District, in order to secure the benefits of better educational facilities and advantages for the pupil children in said district, entered into an arrangement with the Board of Education of Floyd County, Kentucky, during the year 1923 for the construction, operation, and maintenance of the public school in said district and within the corporate limits of the City of Martin, at which both the elementary and high school grades were to be taught; and as an inducement to the establishment of such 12 grade school, said citizens and taxpayers procured at their own expense and donated, without charge to the Floyd County Board of Education, a school site of the value of $5,000, located within the corporate limits of the City of Martin, in the approximate center thereof and described as follows:

"25 lots comprising the whole of Block E in the New Martin Addition to the Town of Martin, Kentucky, and also

a strip of land at the back of said lots, extending from same to the fence above the old county road."

Said land was conveyed to the Floyd County Board of Education by Townsel Combs and others, be deed dated July 14, 1923 appearing of record in Deed Book 65, page 423, Floyd County Court Clerk's Office, which deed recites that such conveyance was made "in consideration of the sum of Five Thousand ($5,000:00) Dollars, all of which sum is to be used by the Floyd County, Kentucky, Board of Education in the building and equipping of a new school building on the site hereby conveyed and sold as aforesaid."

Pursuant to said arrangement, said Board of Education proceeded to and did construct a school building and establish a twelve grade school on the above described parcel of land, but the citizens and patrons of said school, residing within said Consolidated District and particularly within the Town of Martin, in addition to donating the school site, also raised by popular subscription and advanced to said Board of Education for the development of a graded and high school, contributions aggregating approximately $2,800.00.

Thereafter, at an election duly called and held on May 31, 1924, pursuant to notice, as prescribed by statutes of the Commonwealth of Kentucky, in such cases made and provided, the legal voters of Martin Consolidated School District approved and authorized the levy of an annual tax by Floyd County Board of Education of not exceeding seventy five cents on each $100.00 valuation of taxable property in said District, for the purpose of supplementing the funds available from the general school fund for the support, upkeep and maintenance of the high school and graded school established as aforesaid upon said parcel of land in the Town of Martin, which election was approved by order of said Board of Education entered at a regular meeting held on June 13, 1924. After ordering the maximum levy

of 75 cents on the $100.00 valuation for the first two or three years, said Board of Education, about the year 1928, reduced the authorized levy to 50 cents on each $100.00 valuation which has continued in effect from year to year down to the present time and the taxes so levied have been paid each year, by the taxpayers in said District, to the authorized tax collector for said years, and the funds so collected have been turned over each years to said Floyd County Board of Education.

The original building erected on said parcel of land in the Town of Martin becoming inadequate to serve all of the pupil children attending said school in the twelve grades established by defendant, Board of Education of Floyd County, Kentucky, and the patrons and taxpayers of the District desiring to further increase the plant, for the pupils residing in said District, applied to the Board of Education to call an election and submit a referendum to the taxpayers and legal voters in said district, to pass upon a proposed bond issue to raise additional funds for the construction of a second building on the site located in the Town of Martin above described. Said Board of Education by order entered at a regular meeting held on April 12, 1929, which order appears at page 164 in the Record of the County Board proceedings of said date, agreed to give the patrons of the Martin Consolidated School District the right to vote on such question, which was propounded in the following language:

"Are you in favor of the issuing by the Floyd County Board of Education, for the Martin Consolidated District No. 3, of Floyd County, in the sum of ($12,000) for the purpose of establishing, maintaining and operating a public school for this district, and the levying of an annual school tax, sufficient to provide a sinking fund for the payment of the interest on the bonds and the liquidation of the principal thereof at maturity, such annual rate to be deter-

mined by the valuation of the property as assessed for taxation during each of the years said bonds, or any of them, are outstanding, and to cease when all of the bonds and the interest thereon have been paid?"

The Board, in the same order appointed election officers, composed of Dr. W. L. Stumbo, Clerk, Joel Crisp, Judge, C. B. Smith, Judge, and designated and ordered an election to be held in said District of April 29, 1928, the above question to be voted on by the legal voters in said district on the date fixed by the Board of Education in said order. An election was held at said time and place at which the above question was submitted to the legal voters in said district, with the result that 162 votes were cast for said bond issue and no votes were cast against same, all as certified to by the election officers; and which election was later approved by the Board of Education by order duly entered, in which it was provided that said Board unanimously agreed and accepted the vote on said question, as reported by said election officers.

The order of approval was entered on May 10, 1929, at page 175, in the book of proceedings of said Board. The Board further directed, by order entered at page 176, in said book, that the Chairman and Secretary of the Floyd County Board of Education be empowered to contract with a bonding company for the sale of said school bonds, which was done, negotiations having been made for the sale of said bonds to Magnus & Company, a bonding concern in the city of Cincinnati, a resolution was duly adopted at a regular meeting of said Board on July 2, 1929, in which, after reciting the proceedings up to that time, the Board ordered and directed that the bonds of Martin Consolidated School District No. 3, Floyd County, Kentucky, be issued, in the sum of $12,000.00, for the purpose of establishing, maintaining and operating a public school for said district, said bonds to be in the denomination of $1,000 each, numbered "1" to "12" inclusive, to be dated July 1, 1929, and to mature

$1,000.00 annually on June 1 in each of the years 1935 to 1946, inclusive, and bearing interest at the rate of six per-cent per annum, payable semi-annually in accordance with coupons attached to said bonds, both principal and interest being payable at Fifth-Third Union Trust Company, in the City of Cincinnati, Ohio. It was ordered that said bonds be signed by the Chariman and Secretary of the Board, and the sale of the Board affixed thereto, and that the coupons bear the facsimile signatures of said officers. The form of the bonds was set out in said resolution, in which it was recited, in substance, that they were issued under the general laws of the Commonwealth of Kentucky, particularly Sections 4426-2 and 4426-3 of Carroll's Kentucky Statutes, 1928 Supplement, for the purpose of establishing, maintaining and operating a public school for said school district. Said resolution further provided: "that for the purpose of paying the interest on said bonds as it becomes due and providing a sinking fund sufficient to pay the principal thereof at maturity, there is hereby ordered levied a direct annual tax sufficient for said purpose, said tax to continue so long at any of said bonds are outstanding. The Taxing authorities shall annually compute the amount and rate of said tax and the same shall be levied and collected as other taxes are levied and collected, and the proceeds of the same shall be applied to no other purpose except that for which same was levied."

All the $12,000 worth of bonds described in said resolution were issued and sold as therein directed and the money turned over to said Board of Education, and which was used in the construction of an additional building upon the school site in the Town of Martin, above described, which cost approximately the sum of $17,000.00, much the larger part of the cost thereof being raised from the sale of bonds voted by the legal voters in said district as hereinabove set forth.

Upon the completion of said building in the year 1929, the Board of Education of Floyd County took over the control and management of said building and has used same in conjunction with the original building erected on said school site in operating and maintaining a twelve grade school for the patrons of said Martin Consolidated School District.

While under the terms of said bond issue, submitted to and voted by the legal voters in said consolidated school district, the Board of Education of Floyd County as to annually compute the amount and rate of tax necessary to defray the interest and principal of said bonds when and as the same became due, and that the proceeds thereof should not be applied to any purpose other than that for which same was levied, said Board has breached and failed to observe said contractual obligations, in that they have annually since the passage of said bond issue in the year 1929, levied and collected the full levy authorized by said bond isue of 25 cents on each $100.00 worth of property in said district, without regard to the requirements in paying the interest and principal of said bonds, and said Board also failed to set up a sinking fund from the revenues so received, with which to retire said bonds and, on the contrary, said Board has diverted the revenues collected each year on the levy so voted by the taxpayers in the Martin Consolidated School District and commingled same with the general school funds of Floyd County, Kentucky using only enough thereof to pay accrued interest and each bond when and as the same became due, and using the remainder of said revenues for other purposes, and for the support of other schools in Floyd County outside of Martin Consolidated School District. Plaintiffs now call upon the defendants to make an accounting which will accurately show the full amount of all revenues collected and received by the Floyd County Board of Education, thru the levy of the

consolidated school tax, and also the 25 cent levy on account of said bond issue, covering each of the years 1929 to 1938, inclusive and that any excess in revenue collected and turned over to Floyd County Board of Education from said special levies in Martin Consolidated School District and not used for the purposes for which such taxes were voted, and authorized, be credited to the respective accounts of Martin Consolidated School District.

Said Board of Education has collected from said special levies and particularly from the levies on account of said bond issue, large sums in excess of the amounts actually used for the purposes for which said levies were voted by the legal voters in said district, the exact amount however not being known to the plaintiffs at this time, for which reason the same is not set out herein.

Of the $12,000 worth of bonds voted by the legal voters in Martin Consolidated School District, as hereinabove set out, only bonds numbers 1, 2 and 3, in the face amount of $3,000 have been retired from the revenues collected and turned over to said Board of Education on account of said special levy of 25 cents on the $100 voted by the legal voters in said district, and there is now in the hands of said Board of Education a considerable sum of Money, the amount of which is not known to plaintiffs, to the credit of said bond fund, but which has been commingled with other school funds of said County and not set apart in a sinking fund to retire said $12,000 worth of bonds.

They state that through the contributions and donations on the part of the citizens and taxpayers of Martin Consolidated School District hereinabove described, supplemented in a small part by the proportionate part of the revenues belonging to said district out of the general school funds in Floyd County, there was developed a modern school plant which has been used since the year 1929 by Floyd County Board of Education in conducting a twelve

grade school for the benefit of all pupil children in Martin Consolidated School District. This school plant, now located on the site hereinabove described is in the approximate center of the corporate limits of the Town of Martin, on the main State Highway traversing said town, and easily accessible to at least 90 percent of the pupil children, who are in such close proximity to said school that they can conveniently reach same by walking only a short distance from their homes without requiring transportation to be furnished either by the County or by the patrons of the district. The Town of Martin is closely built up, and of the approximately 250 high school students who regularly attend said school in its present location, at least 70 percent live in the corporate limits of the Town of Martin, and only some 20 or 25 who attend the school live outside of the district. There are approximately 250 pupils in the elementary grades who attend said school, and of this number, at least 70 percent of them live in the corporate limits of the Town of Martin; more than 90 percent of the students in said district who attend said school at its present location reside in a radius of not exceeding one half mile of the school plant, and most of them have access to an improved highway and paved streets and sidewalks adjacent thereto, for use in reaching the school at its present location.

The Town of Martin has a modern, up-to-date works system with filtration plant, which serves the school plant where it is now located, with pure water for the use and benefit of the pupils attending said school. Said school is also equipped with electric lights from the power lines located in said town, and with natural gas connected with the main lines leading into said town, and is located on a paved street leading thru said town, and there is established and maintained in said Town of Martin, an efficient police force, who diligently enforce all laws and traffic regulations so as to protect the children and pupils attending said school; and there is an adequate sewer system now in use,

which serves the school plant where it is now located, and the Town of Martin also contemplates, in the very near future, the construction of a more modern and up-to-date sewer system for the entire municipality.

Said town of Martin has a complete system of street lights, which lights are available at all times when needed to afford complete protection to the school plant when not in use, and also to serve the patrons and pupils of said school in attending various functions and school activities when conducted at night time. There is also ample parking space in close proximity to said school building on and about the paved streets of the Town of Martin, to serve the patrons of said school on any and all occasions when they desire to attend any school activities being held or conducted at said plant.

Although the taxpayers and patrons of said school, residing in Martin Consolidated School District, through their concerted efforts and at great personal sacrifice on their own part, have assisted in the establishment and development of a high class school plant for the twelve grades in the Town of Martin and upon the site above described, and which was the first school of its kind established in Floyd County, the defendants, Board of Education of Floyd County and Charles Clark, Superintendent of Schools have wrongfully, unlawfully, arbitrarily and without reasonable discretion, set about to, and unless restrained and enjoined by proper orders of this court, will construct a new school plant at great expense near Eastern Kentucky, at which they will order and direct all high school students within the confines of Martin Consolidated School District to attend, and will abolish the present high school now located in the Town of Martin.

The Floyd County Board of Education at a meeting previously held undertook to purchase a site at Eastern, Kentucky, for construction of a new high school to be a high

school to which the students of the Martin School District would have to be transported by bus.

The site was selected by the defendant, Board of Education of Floyd County, Kentucky and purchased at a price at more than twice in excess of its reasonable market value, is not favorably situated for a high school.

It is approximately eight miles from the boundary line of the City of Martin, and thirteen miles from Allen, Kentucky, which is a part of the Martin School District; that unless the pupils who reside in the Martin School District are transported to this proposed new school by bus, the school can not be built, as the plans are to transport all the high school students, not only from Martin, but also from Maytown, Garrett, and Wayland. There is no water system in close proximity to the proposed new site, and pure water cannot be procured or furnished to be used by the students and teachers at such location except at an enormous expense; there are no sewage lines leading from the proposed new building; there is no police protection available for the protection of the new building that might be constructed upon the new site or for the protection of the pupils going to and from said present new site on the highway or for the maintenance of order in that vicinity; that there is no fire protection available for the protection of the new building that might be constructed upon said new site; that the nearest fire department is located at the City of Martin, Kentucky, eight miles away.

4. That in a previous suit late pending in this Court, styled Orris Gearheart, et al. vs. Board of Education of Floyd County, Kentucky, et al., the Floyd Circuit Court, after hearing all the proof, entered the following judgment:

"This cause, having been submitted to the court for trial and judgment upon the whole case, and the court, upon consideration of the pleadings, proof and exhibits, and being fully advised, finds, orders and adjudges, as follows:

(1) That the Martin Consolidated School District was created and organized about the year 1923 and by agreement between the citizens and taxpayers of said district of the one part and the Floyd County Board of Education of the other part, a twelve grade school was established in the Town of Martin and within said Martin Consolidated School District, which twelve grade school, ever since has been and is now being maintained. The citizens and taxpayers of said district, as a part of said arrangement with Floyd County Board of Education, purchased the school site in the Town of Martin, for the sum of $15,000, which was conveyed to said Floyd County Board of Education, without charge, said parcel of land being valued by the parties at the sum of $5,000.00 and in addition thereto made substantial contributions toward construction of the first building on said site. A special consolidated school tax was voted by the legal voters of said district about the year 1923 of 75¢ on the $100.00 valuation of all taxable property in said district to supplement the revenues available from the common school levy for the running expenses of said school, which tax was reduced to 56¢ on $100.00 valuation about the year 1928. Thereupon, by further agreement between said Board of Education and the citizens of said Consolidated School District, a second building was erected on said school site in the Town of Martin and to pay part of the cost thereof there was submitted to and voted by the legal voters of said district a bond issus of $12,000, the proceeds from the sale of said bonds being used in the construction of said new brick building for use in enlarging the twelve grade school already existing on said site; that the original building which was a frame structure, is now being used for a gymnasium as well as an emergency class room and that the County Board of Education has been required, during the last school year, to rent rooms in the Town of Martin for one or more of the subjects taught in said school.

There is now being maintained a twelve grade school in said Martin Consolidated School District, established as above stated and the Court is of the opinion that it would be an abuse of discretion on the part of the defendants, Board of Education of Floyd County, and Town Hall, Superintendent of Schools, to discontinue, abandon or suspend the teaching of any of the twelve grades at said school now located in said district, so long as there is a sufficient number of pupil children in said district to meet the legal requirements or to require the pupil children of said district in any of the twelve grades to attend school outside of said district.

It is ordered, therefore, that the defendants, Board of Education of Floyd County, Kentucky, and the individual members thereof, and Town Hall, Superintendent of Schools of Floyd County and their successors, and each of them, are hereby directed to maintain the twelve grade school now located in the Town of Martin and within the said Martin Consolidated School District, and to take any and all appropriate action necessary and incidental thereto, including the hiring of teachers, paying teachers' salaries, prescribing full and complete courses in the twelve grades and defraying all expenses necessary and incidental thereto; that said defendants and their successors in office and each of them, be and they are hereby perpetually enjoined from abandoning, discontinuing, or suspending the teaching of any of the twelve grades in said school now located in the Town of Martin, and within the Martin Consolidated School District, so long as there is a sufficient number of pupil children residing within said district to meet the legal requirements for maintaining a twelve grade school and from requiring the pupil children in said district or any of them, in all or any of said twelve grades, to attend any school located outside of said District, all to the end that said twelve grade school now located in said Martin Con-

solidated School District shall continue to be maintained and operated as a twelve grade school without being disturbed."

That said judgment is still in full force and effect and has never been reversed, repealed from, modified or altered in any respect. A copy of said judgment is filed herewith and marked Exhibit "A" for identity.

That there are now in the Martin School District, referred to herein, more than sufficient pupils to meet the legal requirements.

The nearest sewage plant to the proposed new site is located in the City of Martin. The nearest Police Protection available for the protection of the proposed new building it located in the City of Martin. The nearest fire facilities is located in the City of Martin. The nearest doctors and hospitals to the proposed new site are located in the City of Martin. In fact, the City of Martin is the center of said district in which said school is to be constructed.

That the selection of the site at Eastern by the defendants was and is a gross abuse of discretion and was brought about solely by political considerations; that there are at least four sites in the City of Martin which are suitable for construction of the new school building, all of which sites were well known to the defendants when they attempted to select the Eastern site.

In violation of the terms of said judgment, above referred to, the defendants are unlawfully and illegally proceeding to and will unlawfully and illegally at 2:00 p.m., January 10, 1969 open bids for the construction of the school buildings on said new site and will unlawfully and illegally, unless restrained by this Court, attempt to enter into a contract with the highest bidder for the construction of such buildings on said new site.

That unless they are granted a temporary restraining order against the defendants and each of them from doing

the things hereinbefore complained of, great and irreparable injury will result to the citizens, residents, patrons of the Martin School District and they will be made to unjustly suffer inconvenience and loss.

That no injunction or restraining order has been asked for and granted or refused by this Court on application of these plaintiffs nor by any circuit judge or other office of this Court; that they have no adequate remedy at law; that great and irreparable injury and loss will be suffered by the delay necessary in giving notice of this application for an injunction or restraining order and in giving notice of their intention to apply therefore.

That the Floyd Fiscal Court as the agent of the Board of Education of Floyd County, Kentucky, has advertised that it will open seal bids for the construction of the high school referred to herein on January 10, 1969. A copy of said advertisement is filed herewith and marked Exhibit "1" for identity.

Wherefore, plaintiffs demand:

1. That this Court grant to them a temporary restraining order enjoining and restraining the defendants from:

a. Constructing a high school or other school building upon the site referred to herein.

b. From accepting any bid or bids or awarding any contracts for the construction of a high school or other building upon said site.

c. From discontinuing or removing the present high school or any of the grades from the said school in the City of Martin outside the corporate limits.

2. That said temporary restraining order be made permanent and that a permanent injunction be issued herein enjoining the said defendants and each of them from doing any of the acts herein above enumerated.

3. That they recover their costs and be granted all other relief to which in equity they may appear entitled, both general and special.

Dated: January 10, 1969.

s/ Joe Hobson
Prestonsburg, Kentucky
Attorney for Plaintiffs

State of Kentucky
County of Floyd . . . Set

The affiant, Clynard Jones, states he is one of the plaintiffs and that the allegations of the above and foregoing complaint are as true as be believes.

s/ Clynard Jones

Subscribed and sworn to before me, this 10th day of January, 1969.

s/ Joe Hobson
Notary Public, State of Kentucky, at Large

No. 6953
Filed 10 day of Jan., 1969
Summons and 6 Copies Issued
Frank DeRossett, Clerk
By s/ D. Anderson, D. C.

APPENDIX F

II.

Neither the Floyd Circuit Court Nor This Court Has Jurisdiction to Set Aside the Judgment Entered on January 21, 1939, Because Such an Action Would Deprive the Citizens of the Martin Consolidated School District of the Property Rights, Acquired Under Said Judgment, Without Due Process of Law and Will, Therefore, Be Repugnant to the Fourteenth Amendment to the Constitution of the United States.

The citizens of the Martin Consolidated School District contributed a large amount of money to the building of the school facility at Martin and voted to levy taxes for this purpose. Furthermore, by agreement between the Board of Education and the citizens of the Martin Consolidated School District, a second building was erected in the Martin Consolidated School District and to pay part of the cost of this building, the legal voters of the Martin Consolidated School District voted a bond isue of $12,000.00, the proceeds from which were used in the construction of the new brick building for use in enlarging the said 12-grade school already existing on the site (Tr., First Appeal, pp. 18-21).

The citizens of the Martin Consolidated School District, therefore, acquired property right by reason of the entry of said judgment and neither the Floyd Circuit Court nor this Court have jurisdiction to vacate or modify any of the provisions of said judgment as such action would deprive the citizens of the Martin Consolidated School District of their property rights without due process of law and would be in irreconcilable conflict with the Fourteenth Amendment to the Constitution of the United States.

In the case of Pennsylvania Co. v. Scott, 144 A.L.R. 852, the rule on this question is thus stated:

> *"There are two reasons for this limitation of legislative power; one, that a judgment is property of which, under state and federal constitutional prohibitions, the judgment creditor cannot be deprived without due process of law; the other, that under our system of the division of governmental powers the legislature cannot invade the province of the judiciary by interfering with judgments or decrees previously rendered."* (Our Emphasis.)

To the same effect, see the following cases:

Arnold & M. Co. v. Industrial Commission, 314 Ill. 251, 145 N. E. 342, 40 A. L. R. 1470;

Springstun v. Springstun, 131 Wash. 109, 229 Pac. 14, 40 A. L. R. 595.

The Federal Courts are committed to the same rule.

Collins v. Welsh, 75 Fed. 2d 894, 99 A. L. R. 1319.

A petition seeking a writ of certiorari was filed with the Supreme Court, but the petition was denied by that Court.

Collins v. Welsh, 295 U. S. 762, 79 L. Ed. 1704, 55 S. Ct. 921.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1972

No. 71-1312

JAKE LAYNE, ET AL. - - - - - Petitioners

versus

BOARD OF EDUCATION OF FLOYD COUNTY, KENTUCKY, ET AL. - - - - - Repondents

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

PAGE

Statement of the Question Presented 1

Statement 1

Argument—There Is No Basis on Which to Grant the Writ 2

Younger v. Harris, 401 U. S. 37 2

Atlantic Coastline Railway Co. v. Engineers, 398 U. S. 281 2

Conclusion 2–3

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE QUESTION PRESENTED

Is there any substantial ground for granting a writ of certiorari to review the judgment and opinion of the Court of Appeals of Kentucky?

STATEMENT

The statement of petitioners is reasonably accurate insofar as it goes. However, it overlooks the fact that changing circumstances and conditions require governmental agencies, such as school boards, to exercise discretionary powers to accomplish the greatest benefit to the greatest number of people.

ARGUMENT

The Court of Appeals of Kentucky has ruled that the doctrine of *res judicata* does not apply in this case for two reasons:

1. A small segment of persons purporting to represent the City of Martin could not bind a public body representing all of Floyd County.

2. A school board cannot lose its discretionary powers through litigation.

The Federal Courts should use great caution in interfering with the Judgments and orders of the state courts.

Younger v. Harris, 401 U. S. 37.

Any doubt as to the propriety of Federal Courts to overturn the judgment of a state should be resolved in favor of permitting the state court to proceed in an orderly fashion.

Atlantic Coastline Railway Co. v. Engineers, 398 U. S. 281.

The opinion and judgment of the state court is based upon sufficient facts, sound logic and legal principles. We are unable to find any justification for granting the writ.

CONCLUSION

The case was carefully considered by the Court of Appeals of Kentucky. The ruling was in accordance with the laws of the State of Kentucky and the United States. The State Court interpreted the effect and

legality of a prior judgment. Petitioners were not parties to the action resulting in that judgment. The judgment in this case could not have been repugnant to any title, right, privilege or immunity which they might have had. They had none. No constitutional question was involved and there is no ground for a writ of certiorari.

Respectfully submitted,

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Pikeville, Kentucky 41501

Attorney for Respondents